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NO. 83-172

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

COURT HOUSE PLAZA COMPANY,

Petitioner,

v.

CITY OF PALO ALTO, ET AL.,

Respondents.

On Petition From The United States Court of Appeals
For The Ninth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 1983

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Petitioner Court House Plaza Company ("Petitioner") submits this reply to the Brief in Opposition to Writ of Certiorari[1] filed by Respondents City of Palo Alto, et al.

I. THE DOCTRINE OF *RES JUDICATA* AS APPLIED BY COURTS WOULD NOT BAR PETITIONER'S SUBSEQUENT ACTION *FOR DAMAGES*.

Respondents contend that California law on *res judicata* binds the federal courts in this action under 42 U.S.C. §1983 and that such law would bar Petitioner's action. Resp. B. 13-18. Without reiterating all the powerful reasons of policy against applying California law in this case, Petitioner will accept Respondents' premise, *arguendo*, and dispute their conclusion. California courts would *not* bar Petitioner's action for damages based upon constitutional violations under *res judicata* or any preclusion doctrine.

Respondents shore up their *res judicata* argument with detailed footnotes on California law. Resp. B. 16-18, notes 12, 13. Indeed, the Court may suspect that the difficult questions of law have been artfully buried alive in the notes and so left to pass quietly away.

Yet the California Supreme court speaks forcefully enough about the "primary rights" test for *res judicata* that represents California law. In *Agarwal v. Johnson*, 25 Cal.3d 932, 954, 603 P.2d 58, 72, 160 Cal.Rptr.141, 155 (1979), the court refused to rely solely upon commonality of historical facts:

> Under the 'primary rights' theory adhered to in California, it is true that there is only a single cause of action for the invasion of one primary right. [Citation omitted.] But the significant factor is the harm suffered; that the same facts are involved in both suits is not conclusive.

On its facts, *Agarwal* involved an employee who had prosecuted and lost a Title VII action in federal court before bringing a state-court action for defamation and infliction of emotional distress. Both actions sought damages. And both actions arose

[1] All references to the Brief in Opposition will be given in the form "Resp. B." followed immediately by page number.

from the same historical event. Nevertheless, the California Supreme Court held that the subsequent state action involved a separate cause of action and therefore *res judicata* would not apply.

The result should be no different under California law where the statutory cause of action for damages Title VII in *Agarwal*, § 1983 here – follows the state-court action.

Respondents attempt to distinguish *Agarwal* by suggesting that there the first action (under Title VII) involved "property rights," while the second (defamation) involved "personal rights." Resp. B. 15-16, note 11. This distinction is forced. A man's loss of his job is as much a personal injury as a loss of property; one could say much the same about a loss of a man's good name. *Agarwal* simply makes this case appear a less likely candidate for dismissal on *res judicata* grounds. For here Petitioner has never prosecuted to judgment any other action for damages.

In a more recent application of the "primary right" test in the California courts, *Sawyer v. First City Financial Corporation, Ltd.*, 124 Cal.App.3d 390, 177 Cal.Rptr. 398 (1981), the court held that a prior action for breach of contract (collection of a promissory note) did not bar a subsequent action under a variety of tort theories that also sought collection on the note. Initially, *Sawyer* recited the relevant California procedural rule:

> Where the plaintiff has several causes of action, however, even though they may arise from the same factual setting, and even though they might have been joined in one suit under permissive joinder provisions, the plaintiff is privileged to bring separate actions based upon each separate cause.

Id., at 399-400, 171 Cal.Rptr. at 402. Advocating a flexible and discriminating application of *res judicata*, the *Sawyer* court acknowledged,:

> The theoretical discussion of what constitutes a 'primary right' is complicated by historical precedent in several well-litigated areas establishing the question of 'primary

> right' in a manner perhaps contrary to the result that might be reached by a purely logical approach.

Id., at 400, 177 Cal.Rptr. 403.

There is nothing surprising about the flexibility with which the California courts apply the "primary rights" test. In fact, the doctrine of *res judicata* itself arises from equitable considerations. See *Jackson v. Jackson*, 253 Cal.App.2d 1026, 62 Cal.Rptr. 121, 129-30 (1967) and authorities cited therein. Equitable considerations never disappear from the judicial act of interpreting and applying *res judicata*.

II. WHAT RESPONDENTS LABEL "CHP III" IS A CALIFORNIA ACTION FOR DAMAGES IN WHICH AN APPEAL REMAINS PENDING, NOT A FINAL OR *AUTHORITATIVE RULING BY THE CALIFORNIA COURTS*.

Respondents attempt to give the impression that Petitioner has litigated every issue at least three times. Dignifying their argument with Roman numerals, Respondents describe "CHP III" as a state-court adjudication on *res judicata*. Resp. B. 8-9, 19.

Upon examination, it turns out that "CHP III" is a California trial court's order of dismissal of *state constitutional* claims only. Moreover, the dismissal is not a final judgment because it remains on appeal. See Resp. B., Appendix G, p. A-92. Finally, "CHP III" was originally filed on September 22, 1977, a few months after the Mandamus, but never prosecuted to trial because the California courts strongly favored initial resort to equitable remedies. See Petition for Certiorari, Argument III.

III. THE DECISION IN THE MANDAMUS DID NOT ADJUDICATE PETITIONER'S *FEDERAL CONSTITUTIONAL RIGHTS*.

Respondents repeatedly translate "vested right," as used by the California courts in determining the proper standard of judicial review in mandamus proceedings, into federal constitutional rights embraced in section 1983. But this facile interchange of terms should not mislead the Court. What was actually litigated in the Mandamus ("CHP I") were only the

limited questions of the scope of judicial review of the City's administrative decision and Petitioner's right to receive a writ to compel issuance of permits by the City.

The Memo of Decision by the trial judge in the Mandamus discusses "vested rights" in that context only. See Appendix to Jurisdictional Statement in U.S. Docket No. 81-404, *cert. denied*, 454 U.S. 1074 (1981), at pp. A-1 ff. The Memo simply does not address constitutional rights. The subsequently entered conclusions of law contain catch-all references to "due process" and "equal protection." *Id.* at pp. A-19 ff. But again there is no reference to any provision of the California or United States Constitution. Accordingly, any such reference in the appellate opinion in the Mandamus can only be regarded as dictum, completely gratuitous and unnecessary to the court's decision. *Cf.* Resp. B.3.

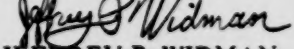
IV. CONCLUSION

Respondents have not overcome the powerful reasons of federal policy and fundamental fairness that find expression in the Petition for Certiorari. The Petition should be granted.

Dated: October 24, 1983

Respectfully submitted,

SIMS & WIDMAN



JEFFREY P. WIDMAN

Attorneys for Petitioner

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

Jeffrey P. Widman, being first duly sworn upon his oath deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioner in this cause; that on the 24th day of October 1983, he mailed three copies of Petitioner's Reply to Respondents' Brief in Opposition to Petition for Writ of Certorari in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Diane M. Lee
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City of Palo Alto
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Palo Alto, CA 94301

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and that he also mailed forty copies of Petitioner's Reply to Respondents' Brief in Opposition to Petition For Writ of Certorari to the Clerk of This Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

Jeffrey P. Widman
JEFFREY P. WIDMAN

SUBSCRIBED AND SWORN to before me this 24th day of October, 1983.

Witness my hand and official seal.

OFFICIAL SEAL
A. B. DREXLER
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SANTA CLARA
Comm. Exp. July 15, 1986

A.B. DREXLER
NOTARY PUBLIC

My commission expires 7-15-86